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82-263

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NICK BOULAHANIS and DONALD SCALISE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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QUESTIONS PRESENTED

1. Whether the Confrontation Clause of the Sixth Amendment and Rule 804 of the Federal Rules of Evidence permit the admission into evidence of a court reporter's transcript of the Grand Jury testimony of a putative Government witness who was present at the trial but simply refused to testify because of his unarticulated and unspecified fears for which the Defendants were not responsible?

2. Was federal jurisdiction under the Hobbs Act, 18 U. S. C. § 1951, sufficiently established according to the Government's Depletion of Assets theory and the Seventh Circuit's distinction based upon the nature of the victim?

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners, by their attorneys, petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming their convictions upon Count One of the indictment in the instant case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in this case is reported as *United States* v. *Boulahanis*, No. 81-1405, 677 F. 2d 586 (7th Cir. 1982). It is reproduced in the Appendix. No opinion was filed in the District Court.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 6, 1982. A timely petition for rehearing with the suggestion for rehearing *in banc* was denied on June 15, 1982. The order of denial is reproduced in the Appendix. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS, RULES AND STATUTES INVOLVED

Pursuant to Supreme Court Rule 21.1(f) the following constitutional provision, rule and statutes are set forth in the Appendix:

Title 18 United States Code § 2

Title 18 United States Code § 1951

United States Constitution, Sixth Amendment

Federal Rules of Evidence, Rule 804.

STATEMENT

Petitioners were charged in the District Court in a two count indictment with violations of 18 U. S. C. § 894 (extortionate credit) and 18 U. S. C. § 1951 (extortion). Under circumstances set forth in the opinion of the Court of Appeals, a severance of the case against the Co-Defendant Frank Renella was granted immediately prior to the trial of Petitioners. After trial by jury both Petitioners were convicted upon each of the two counts and sentenced to serve five years and seven years respectively in the custody of the Attorney General. On appeal to the Court of Appeals for the Seventh Circuit Petitioners' convictions on Count One, the Hobbs Act Count, were affirmed but those on Count Two were reversed, the Court holding that § 894 was not violated in the absence of an identifiable

extension of credit. Because the sentences imposed upon Petitioners could have been influenced by their convictions under both counts, the Court of Appeals remanded to the District Court for resentencing under Count One.

The evidence at the trial concerned the events of two days, June 12 and June 13, 1979. At that time Nick Valentzas was the proprietor of an enterprise called the Hellenic Social Club, a storefront operation in Chicago to which various male individuals, largely of Greek extraction, came to socialize and gamble. Valentzas made his living by charging his customers an hourly rate for participation in gambling activity at the club. On June 12, 1982, Petitioners, along with Renella, came to the club. The evidence indicated that Petitioner Scalise stood by the door while Renella, along with Petitioner Boulahanis, accosted Valentzas. An altercation ensued culminating when Renella, in anger and in the presence of some twenty-five patrons of the club, proceeded to break up furniture and generally disrupt activities. T. 522-527.

On the following evening, Petitioners Boulahanis and Scalise[1] again visited Valentzas at the club. Prior to their visit Valentzas had complained to the FBI as a result of the previous night's altercation. Two agents were present at the club on June 13, 1982, and Valentzas was equipped with a tape recorder. The conversation between Petitioners and Valentzas in the alley behind the club was recorded and the transcript admitted into evidence. T. 758-762, 824. The content of that conversation was not overhead by either agent but they corroborated the fact of a conversation. One agent testified that Valentzas had $300 of his own money on his person at the time of Petitioners' visit, the serial numbers of which he had recorded, but there was no search of Valentzas conducted after Petitioners left and, accordingly, no evidence of payment.

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[1] Although the Opinion of the Court of Appeals indicates to the contrary the evidence was clearly that the Co-Defendant Renella was not present on the 13th.

The gist of the extortion offense under the Hobbs Act was proved by the contents of the tape recording in which Valentzas eventually agreed to pay $300 for the month immediately past and $500 on the eighth of each subsequent month in return for which Petitioners would pemit him to conduct gambling activities in the club. They would not shut it down or terrorize the premises and they would not permit anyone else to extort payments from Valentzas.[2]

During the presentation of its case-in-chief the Government called one James Chiampas as a witness. Chiampas apparently was present as a patron of the club on both June 12 and June 13, 1979. He appeared in court with counsel but he simply refused to testify. Making no claim of Fifth Amendment privilege Chiampas' refusal was predicated simply upon that individual's fear for his own safety. The District Judge ordered him to testify but he still refused. No order of contempt was entered although the District Court did explain to Chiampas that his refusal to testify was totally unjustified in the law, and that he could go to jail as a result thereof. The District Court then made a foundation finding of unavailability and permitted the Government to produce Chiampas' Grand Jury testimony before the jury over defense objections predicated upon the Confrontation Clause of the Sixth Amendment and Rule 804 of the Federal Rules of Evidence. T. 722-732.

The Grand Jury testimony of Chiampas, as read to the trial jury, was damaging to Petitioners. The Government did not claim to the contrary below. Chiampas, during his Grand Jury testimony, not only told the Grand Jury in detail about what occurred at the gambling parlor but, in addition, he identified photographs of the Petitioners.

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[2] Valentzas was killed prior to the trial and, accordingly, did not testify. There was no suggestion that Petitioners and Co-Defendant Renella or individuals connected with any of them were responsible for his death.

It was a rather realistic mystery why Chiampas declined to testify at the trial. He claimed he was afraid but he did not accuse anyone of threatening him nor did he articulate any threats to his family. Indeed, Chiampas eschewed in particular any suggestion that anyone, specifically any of the Defendants, threatened him at all. T. 644-652, 618. He, nonetheless, refused even to confirm or deny the truthfulness of his earlier Grand Jury testimony. T. 646-651. The prosecution, it appeared, was prepared to offer Chiampas immunity but he never claimed Fifth Amendment privilege, simply and steadfastly refusing to testify. T. 466-654.

After the voir dire hearing, absent the jury, the Trial Court dismissed Chiampas from the courtroom without entering an order remanding Chiampas into custody. The Trial Court, while banishing Chiampas from the courtroom stated:

> "If you think that you are going to get away with this completely, you are mistaken, and someone ought to tell you that. *If it weren't for the fact that I don't think the matter is worth bothering with,* I would order you imprisoned for contempt of Court. Now you are excused." T. 660-661 [emphasis added].

Chiampas was alive and well and capable of testifying. His refusal was based solely on his announced but unarticulated and unspecified fear. The Trial Court entered no contempt order instead permitting the entirety of the Chiampas Grand Jury testimony to be read to the trial jury. That testimony is reproduced in the Appendix.

At the Hellenic Social Club Valentzas maintained a coffee pot and served coffee, both Greek and American varieties, to his patrons. A cup was provided in which patrons could contribute money to defray the cost of the coffee. However, no price was set nor was the contribution mandatory. T. 515-516. There was a good deal of evidence at the trial in support of the Government's theory of federal jurisdiction concerning the

origins of the coffee, none of which was grown in the State of Illinois, and the commercial distribution system by which coffee reached the Hellenic Social Club. The evidence demonstrated that the coffee sold at or about the time of trial for approximately $5.00 a can and that the Hellenic Social Club consumed about $68.00 worth each month. It was the Government's Hobbs Act jurisdictional theory that the extortion of money from Valentzas revealed by the tape recording of his conversation with Petitioners depleted his assets and as a result thereof he had less money available to spend upon coffee, an item of interstate commerce.

REASONS FOR GRANTING THE WRIT

A. THE CONFRONTATION ISSUE

This case presents important and recurring questions concerning the application of the Confrontation Clause to cases in which Grand Jury testimony is substituted for the live testimony of the declarant in front of the court and jury. This issue has produced inconsistent adjudications among the Courts of Appeals. Accordingly, Petitioners submit, review by this Court is now appropriate.

The decision below, we submit, is the only reported decision in which any federal court of review has allowed the substitution of Grand Jury testimony instead of the testimony of the live witness where the record contains no allegations that the witness was the subject of threats by the defendants on trial or by persons on their behalf. The Seventh Circuit stands alone. No other court of appeals has allowed such a startling violation of either the Confrontation Clause or Rule 804, Federal Rules of Evidence.

In *United States* v. *Garner*, 574 F. 2d 1141 (4th Cir., 1978), the Court affirmed a series of drug convictions finding that the use of the witness Robinson's Grand Jury testimony was permissible in that Robinson did offer testimony before the

trial jury *albeit* the testimony was arguably false. The false trial testimony may have been the result of Robinson being threatened by the defendants or by persons in prison. Since he appeared before the Trial Court there was an opportunity—at least of sorts—for the defense to cross-examine. The Court found that Robinson's earlier Grand Jury testimony was reliable for any number of reasons and thus the admission of that Grand Jury testimony did not violate the Confrontation Clause.

The *Garner* Court also made reference to *United States* v. *West*, 574 F. 2d 1131 (4th Cir., 1978), where another drug conviction was affirmed and Grand Jury testimony was made available to the trial jury. In *West*, the declarant (Brown) was murdered prior to trial and the Government was fairly able to demonstrate that the trial defendants, including West, had some complicity in Brown's murder. 574 F. 2d at 1133-1138.

In both *Garner* and *West* the Court discussed the application of Rule 804(b)(5) and in each case the Court determined that the Grand Jury testimony offered by the Government in each case qualified for admission under that rule. In both *Garner* and *West*, Judge Widener dissented.

Mr. Justice Stewart, joined by Mr. Justice Marshall, dissented from the denial of certiorari in *Garner*, reported *sub nom. McKethan* v. *United States*, 439 U. S. 936 (1978). Concerning reliability and Grand Jury testimony, his opinion offered the following:

> "That the evidence was first given before a grand jury adds little to its reliability. In grand jury proceedings, the ordinary rules of evidence do not apply. Leading questions and multiple hearsay are permitted and common. Grand jury investigations are not adversary proceedings. No one is present to cross-examine the witnesses, to give the defendant's version of the story, or to expose weaknesses in the witnesses' testimony." 439 U. S. at 938, 99 S. Ct. at 335.

Additionally, Justice Stewart pointed out [in 1978] that at that time there was a split in the circuits regarding the admissibility of Grand Jury testimony. 439 U. S. at 939, 99 S. Ct. 335.

Prior to *West* and *Garner* the Court of Appeals for the Fifth Circuit had found Grand Jury testimony inadmissible in *United States* v. *Gonzalez*, 559 F. 2d 1271 (5th Cir., 1977). Prior to the adoption of the Federal Rules of Evidence, the Second Circuit ruled in *United States* v. *Fiore*, 443 F. 2d 112 (1971), that the admission of Grand Jury testimony violated both the Sixth Amendment and the Hearsay Rule.

In *United States* v. *Carlson*, 547 F. 2d 1346 (8th Cir., 1976) the Court affirmed a series of drug convictions finding that the introduction of prior Grand Jury testimony was not violative of either the Federal Rules of Evidence nor the Confrontation Clause. Prior to the admission of the Grand Jury testimony, the declarant stated that he had always been truthful with the Government and the Grand Jury. 547 F. 2d at 1353. Again, prior to the admission of the declarant's Grand Jury testimony, he was held in contempt of court and held for six months in custody. In addition, there was probative evidence before the Trial Court that Carlson (one of the trial defendants) had threatened the witness. Under those circumstances the Court of Appeals affirmed the conviction and found that Carlson had *waived* his right to confrontation by his conduct toward the declarant. 547 F. 2d at 1358-1360.

After 1978, both the Fifth and Tenth Circuits have considered similar questions. In *United States* v. *Balano*, 618 F. 2d 624 (10th Cir., 1980), the Court affirmed a conviction under 18 U. S. C. § 2314 finding that the admission of Grand Jury testimony of the non-appearing declarant was not prejudicial and not a violation of the Confrontation Clause in that the defendant himself had been responsible for generating the "fear" in that witness. The *Balano* Court found a *waiver* of the right of confrontation and thus aligned itself with the Eighth

Circuit in *United States* v. *Carlson*, 618 F. 2d at 628-630. Neither *Balano* nor *Carlson* intimidated that the Grand Jury testimony would have been admitted had it not been for the clear evidence that the defendants in those cases caused the declarant not to testify.[3]

In *United States* v. *Thevis*, 665 F. 2d 616 (5th Cir., 1982) the Court affirmed a series of convictions finding that the use of potential witness Underhill's Grand Jury testimony was permissible in the circumstances of that case. In *Thevis* the Government offered extensive evidence that Thevis and others conspired to murder Underhill and, of course, Underhill's pretrial murder precluded his testifying as a Government witness against Thevis. Only under those circumstances did the Court approve the use of Underhill's Grand Jury testimony. The *Thevis* Court reviewed Rule 804, the Confrontation Clause and the Hearsay Rule in an effort to measure the proper dimension of admissibility *vel non*. Ultimately, the *Thevis* Court found no error in the admission of the Grand Jury testimony because of the *waiver* principle. Simply, the *Thevis* Court found that the defendant, having been responsible for the absence of the declarant, *waived* the constitutional and procedural protections that otherwise would have applied where the Government was attempting to utilize prior Grand Jury testimony as substantive evidence against him. The *Thevis* Court cited both *Balano* and *Carlson* with approval—665 F. 2d at 627, 628, 632. It should be noted, however, that the *Thevis* Court limited the admission of Grand Jury testimony to the circumstances of the case. Indeed, the *Thevis* Court specifically

[3] Both *Carlson* and *Balano* contain extensive reviews of the application of Rule 804 and the Confrontation Clause to the admission of Grand Jury testimony as substantive evidence in situations where the declarant does not offer trial testimony. We shall not review same within the parameters of this petition. Rather, we shall provide an extensive review of same in our brief on the merits in the event certiorari is granted.

noted that its decision "... does not permit wholesale admission of hearsay evidence when a witness is unavailable." 665 F. 2d at 633, n. 17.

This Court has repeatedly noted the importance of confrontation rights in testing the reliability of evidence. The more recent Confrontation Clause cases describe the role of confrontation, and the attendant opportunity to cross-examine, in testing accuracy as so important "... that the absence of confrontation at trial calls into question the ultimate integrity of the fact-finding process." *Ohio* v. *Roberts*, 448 U. S. 56, 64, 100 S. Ct. 2531, 2538 (1980), quoting *Chambers* v. *Mississippi*, 410 U. S. 284, 295, 93 S. Ct. 1038, 1046 (1973). This Court has stated, "[A] primary interest secured by [the Confrontation Clause] is the right to cross-examination." *Ohio* v. *Roberts*, 448 U. S. at 63, 100 S. Ct. at 2537, quoting *Douglas* v. *Alabama*, 380 U. S. 415, 418, 85 S. Ct. 1074, 1076 (1965). In *Chambers* the Court stated:

> "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation and helps assume the 'accuracy of the truth-determining process.' *Dutton* v. *Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 220, 27 L.Ed.2d 213 (1970); *Bruton* v. *United States*, 391 U.S. 123, 135-137, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' *Pointer* v. *Texas*, 380 U.S. 400, 405, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965)." 410 U. S. at 295, 93 S. Ct. at 1046.

This case presents an opportunity not only for further definitive explanation of the Sixth Amendment, but also for the authoritative construction of Rule 804 of the Federal Rules of Evidence. While it is certainly clear that no rule can permit what the Constitution prevents, we ask this Court to review in addition whether Rule 804 can fairly be read to justify the admissibility of Chiampas' Grand Jury testimony.

Rule 804(b)(5) appears, in the scheme of the draftsmanship of the Rule, to constitute a final catch-all subsection which, by the application of the usual rules of statutory construction including that *ejusdem generis*, applies to govern admissibility in instances similar but not identical to the enumerated instances of the preceding subsections. It would appear that subsection 5 was meant to provide criteria for the admissibility of hearsay statements not covered in the first four subsections. But subsection 1, headed "Former Testimony," purports to set forth the criteria applicable to the determination of the admissibility of the former testimony of an unavailable witness. The admissibility of Grand Jury testimony, one would expect, would be judged under subsection 1. It is clear, however, that Grand Jury testimony could never qualify for admission under subsection 1 since the Grand Jury provides no opportunity for cross-examination nor any motive to fully develop the testimony as required by that subsection. Hence, the Government attempts to justify its admission under subsection 5.

We suggest that there is a necessary negative implication in Rule 804(b)(1). As a matter of statutory construction former testimony which does not qualify for admissibility under that rule is inadmissible. There is nothing in the draftsmanship of the rule to suggest that former testimony, not qualifying under subsection 1, should be judged a second time under subsection 5. Subsection 5, we suggest, is available to provide criteria for judgment in connection with hearsay exceptions which are like, but not identical to, those codified in the first four subsections. Such a view of the rule eliminates the need for constitutional adjudication as well as for the application of the standards of subsection 5.

Assuming, *arguendo*, that the admissibility of the Chiampas' Grand Jury testimony is to be judged under subsection 5, that subsection permits admission of the evidence only if its reliability equals or exceeds that of the other exceptions in Rule 804(b). Cf., *United States* v. *Thevis*, 665 F. 2d 616, 629.

There has been no definitive review of Rule 804 in this Court. Even on this subject, however, the decisions below are not in accord. Both *West* and *Carlson* seem to conclude that corroborated Grand Jury testimony meets the reliability standard of Rule 804(b)(5); however, *Thevis* puts the matter in grave doubt as does the language of *United States* v. *Garner*, 574 F. 2d 1141 at 1144, 1146. In the case at bar the Court below found the Chiampas Grand Jury testimony admissible on the authority of *Carlson* and *West* but on what appears to be hearsay grounds not based upon the reliability concept of Rule 804(b)(5). Appendix, at 5a-6a.

The doubts of the *Thevis* Court whether Grand Jury testimony *would ever reach* the level of Rule 804(b)(5) reliability, 665 F. 2d at 629 (5th Cir. 1982), conflict with the action of the Court below in allowing the admission of the Grand Jury testimony absent any realistic review of 804(b)(5). Appendix, at 6a. The Courts of Appeals in *West* and *Carlson* found sufficient reliability to allow the admission of the Grand Jury testimony under 804(b)(5) in that the Grand Jury testimony had some indicia of reliability because in each instance there was corroboration supporting the reliability of the Grand Jury transcripts. In *Thevis*, *West* and *Carlson*, as well as *Balano* and *Garner*, however, the Grand Jury transcripts became admissible because the declarant was unavailable as a result of conduct directed toward the declarant by the defendants in those cases. In our case, there simply is no evidence *at all* to support the *waiver* theory that was the actual ground of decision admitting the Grand Jury testimony in each of those cases.

The Second Circuit in *United States* v. *Flore*, 443 F. 2d 112 (2nd Cir., 1971), declined to admit similar Grand Jury testimony; the Fourth Circuit in both *United States* v. *West*, 574 F. 2d 1131 and *United States* v. *Garner*, 574 F. 2d 1141 (dissent noted in each decision) admitted the Grand Jury testimony on a *waiver* theory in that the conduct of the defendants in both

cases caused the declarant to be unavailable (1978); the Fifth Circuit in *United States* v. *Gonzalez*, 559 F. 2d 1271 (5th Cir., 1977) declined to allow Grand Jury testimony to be admitted, but in *United States* v. *Thevis*, 665 F. 2d 616 the same circuit allowed the admission of the Grand Jury testimony where the defendant was responsible for the murder of the declarant (1982); the Seventh Circuit in this case, *United States* v. *Boulahanis*, 677 F. 2d 586, admitted the Grand Jury testimony of a witness who simply refused to testify where there was no evidence that the defendants or any one acting on their behalf threatened or tampered with the witness. The Eighth Circuit in *United States* v. *Carlson*, 547 F. 2d 1346, admitted the Grand Jury testimony in light of the evidence available that the defendant in that case tampered with or threatened the declarant (1976). The Tenth Circuit in *United States* v. *Balano*, 618 F. 2d 624 admitted the Grand Jury testimony of the non-appearing declarant because the defendant caused the declarant to be unavailable (1980).

In each of the decisions admitting Grand Jury testimony in federal criminal cases, the *only* theory supporting admission was a *waiver* principle. The conduct of those defendants caused the declarant to be unavailable. The Seventh Circuit, in this case, stands utterly *alone*.

This Court has not addressed the question whether the Confrontation Clause or Rule 804(b)(5) permits the Government to proffer Grand Jury testimony as evidence in the absence of the declarant. This case provides an appropriate vehicle for the review and determination of this exceptionally important question in the area of federal criminal litigation. The problem recurs. No authoritative resolution has been found. The circuits are hardly in accord. Under such circumstances, we respectfully submit, the granting of the writ is appropriate.

B. JURISDICTION UNDER THE HOBBS ACT

In the Court of Appeals, Petitioners challenged the application of the Government's depletion of assets theory to the facts of this case in order to convert what appeared to be an entirely usual violation of a state extortion statute into a Hobbs Act prosecution. On the face of it, extortion from the proprietor of an entirely local card room seems well outside the range of cases the Hobbs Act was intended to reach. Petitioners argued that nothing revealed in the facts of this case indicated the presence of any problem of national concern or scope. The extension of Hobbs Act jurisdiction to the case of local card players, we suggested, entirely exceeded any jurisdictional limitations upon federal law enforcement in robbery and extortion cases. In short, the depletion of assets theory as applied to the purchase of coffee converted the Hobbs Act into a general extortion and robbery statute virtually indistinguishable from those enforced in the several states.

Petitioners relied upon the Seventh Circuit decision in *United States* v. *Mattson*, 671 F. 2d 1020 (7th Cir., 1982), in which the Court rejected the Government's attempt to apply the Hobbs Act to payments made to a local examiner with authority to license electricians in the City of Chicago. The opinion in the instant case attempts to reconcile affirmance here with reversal there on the theory that the money in *Mattson* was extorted from an individual whereas the victim in the instant case was a business enterprise. We suggest that in a recurring matter of such importance to the administration of the Hobbs Act such a distinction simply will not do.

The opinion below indicates intellectual dissatisfaction with this distinction but adopts it nonetheless because it has some "pragmatic justification" and draws an easily discernible line separating those cases falling within the ambit of the Act from those without. The distinction relied upon cannot be justified either intellectually or pragmatically. Nothing having to do with the purpose of the Act to protect interstate commerce

depends to the slightest degree upon whether the victim is an individual as opposed to a corporation, partnership, or some other form of enterprise. Reliance upon such a distinction does not even share the attractiveness of a bright line rule in that its somewhat arbitrary nature may be justified by ease of application. It is not easy to apply. The instant case, on its facts involving a gambler running a card room, demonstrates that beyond peradventure. Specifically, in a case in which there was no proof of any payment at all, the determination whether the money was to come from Velentzas individually, Valentzas as gambler, Velentzas as proprietor, or Velentzas as representative of the Hellenic Social Club, is next to impossible.

The policy considerations supporting the limitation of Hobbs Act jurisdiction to those cases demonstrating a realistic probability of some adverse consequences to the channels, facilities or instrumentalities of interstate commerce are almost too plain to require enumeration. With due regard to an ever increasing federal influence upon the lives of the citizenry and the ever decreasing number of transactions occurring in the country which have purely local ramifications, a sound federalism requires the exercise of some discretion in the application of criminal statutes predicated upon the Commerce Clause. Practical considerations militate with equal vigor to the same conclusion. While modern methods of travel, communication and transportation have certainly increased the difficulties involved in the detection and prosecution of crime by local authorities, there remains a sphere in which the authority of those local agencies ought to be respected. The constitutional scheme is still one of plenary state sovereignty coupled with delegated and limited national power. This is a case in which that line has been overstepped.

The Hobbs Act, in addition to extortion, proscribes affecting interstate commerce by robbery. Indulging the Government's depletion and coffee theories, it is clear that strongarm

robberies of the sort dealt with in huge numbers day after day in the criminal courts in every state constitute Hobbs Act violations. No such result was intended by Congress, nor should it be countenanced by this Court. When a need exists—when the protection of a real national interest is involved—when issues are presented that are national in scope—then jurisdiction under the commerce clause ought to be vindicated. Here, there is no practical need, no national interest nor any issue of national importance presented.

The purpose of the Congress in enacting the Hobbs Act was to protect the instrumentalities of interstate commerce against injury from extortion. *United States* v. *Green*, 350 U. S. 415 (1956). Its application in this case outruns that purpose. The holding of the Court below gives currency to a distinction having little to do with the constitutional objectives of the Commerce Clause or with the legislative objectives of the Hobbs Act. Every aspect of the application of the Government's theory of commerce to affirm the convictions of Petitioners is artificial. We respectfully suggest that it is important that some limitation be placed upon the artificiality of the jurisdictional element of federal crimes. Because of the importance of that issue to the administration of criminal justice in the federal courts we respectfully petition this Court to issue its Writ of Certiorari.

CONCLUSION

For the reasons discussed above, we respectfully submit that this Court ought to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review that Court's judgment in the instant case.

Respectfully submitted,

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August, 1982

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-1405

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NICK BOULAHANIS and DONALD SCALISE,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80-CR-408—George N. Leighton, *Judge.*

ARGUED APRIL 1, 1982—DECIDED MAY 6, 1982

Before ESCHBACH, *Circuit Judge,* NICHOLS, *Associate Judge,** and POSNER, *Circuit Judge.*

POSNER, *Circuit Judge.* Nick Boulahanis and Donald Scalise appeal from their conviction on one count of violating the Hobbs Act, 18 U.S.C. § 1951, and one count of violating 18 U.S.C. § 894 (extortionate collection of extensions of credit).

Nick Velentzas owned the Hellenic Social Club in Chicago. Men, mostly of Greek extraction, would come there to talk, drink coffee, play cards, and shoot dice—and gamble. One night the appellants showed up in the

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* Of the United States Court of Claims.

company of Frank Renella. They proceeded to beat up Velentzas, and one of the appellants also smashed a lot of furniture. Velentzas went the next day to the FBI, who equipped him with a recording device which he strapped to his ankle. That night the appellants and Renella reappeared and had a conversation with Velentzas (outside the club) that was taped by the recording device. In this conversation, which was played to the jury, the appellants and Renella told Velentzas in language free from any shade of ambiguity that if he did not pay them $300 for the past month and $500 per month thereafter for allowing gambling in the club they would shut it down, while if he did pay they would not only "terrorize nobody more in here" but would beat up anyone else who was trying to extort money from Velentzas.

Several days later, Renella turned himself in to the FBI and made statements incriminating himself and one of the appellants. He was indicted along with both appellants and all three were scheduled to be tried together. Prior to trial Renella moved to suppress his statements and at the suppression hearing it emerged that he was a former FBI informant. Shortly after this bombshell exploded, Renella disappeared. The appellants moved to sever his trial from theirs. The government opposed the motion; it wanted to try Renella *in absentia* along with the appellants. Before acting on the motion the court conducted a hearing into the circumstances of Renella's employment as a government informant. The hearing revealed that Renella had been dropped as an informant three years earlier (though without being told of the fact). Since then he had had intermittent contacts with the FBI, culminating in the meeting in which he turned himself in, but he had not returned to the government payroll or passed information to the government beyond what anyone who found himself in a criminal scrape might pass in an effort to get more lenient treatment for himself. He had not given the government any information about the appellants' defense tactics or planning.

The district court granted the motion to sever Renella's trial from the appellants' and also the motion

to suppress Renella's statements. The appellants argue that this was not good enough; that the planting of a government informant in the defense camp was so reprehensible that nothing short of dismissal of the case with prejudice will remove this ugly stain from the Justice Department's escutcheon. We disagree with this characterization of the government's conduct. Hiring a criminal as an informant does not create an indissoluble lifetime bond between him and the government. When Renella ceased to be an informant the government could treat him like any other criminal, and indict and try him with his confederates if that was otherwise the proper procedure in the circumstances. Of course if while under indictment Renella had decided to try to revive his relationship with the FBI and had come to them with an offer to spy on his codefendants in exchange for money or leniency, the FBI would have been guilty of serious misconduct in accepting the offer. Since there is no evidence this happened, we need not speculate on what (if any) further sanction for such misconduct would be appropriate, beyond suppression of the fruits of the improper spying.

Another procedural issue has to do with the admission into evidence at the appellants' trial of the grand jury testimony of James Chiampas, who was present at the Hellenic Social Club on both of the crucial nights. He was scheduled to testify for the prosecution, but before the trial began he told the government that he would not testify because he was afraid of being killed. Velentzas had been murdered by persons unknown and Renella had fled, perhaps because of fear for his own life. Chiampas was nevertheless subpoenaed to appear at trial and he did appear, but he refused to answer ary questions though ordered twice to do so by the judge; he explained that he was afraid for his life. He was then excused and the government offered in evidence his grand jury transcript. The court admitted it, and it was read to the jury. In it Chiampas described the fight and also stated that the appellants had returned the next night and gone outside with Velentzas.

The appellants contend that the admission of the grand jury transcript into evidence violated both the

Federal Rules of Evidence and the Sixth Amendment, since a transcript cannot be cross-examined. Rule 804(a)(2) of the Federal Rules of Evidence allows a hearsay statement to be admitted only (so far as is relevant here) if the declarant "persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so . . . ." The appellants contend that Chiampas' persistence was not adequately tested because the district judge did not threaten him with contempt. But Chiampas was accompanied by counsel who must have explained to him the possible consequences of failing to testify. And since Chiampas' testimony, as we are about to see, was not vital to the government's case, it would have been needless cruelty for the court to have put Chiampas to a choice between going to jail and running the risk of meeting Velentzas' fate.

But persistence of a witness in failing to testify is only a necessary and not a sufficient condition for admitting a hearsay statement. Since grand jury transcripts do not come within one of the specific hearsay exceptions in Rule 804, they are admissible if at all only under the stringent criteria of 804(b)(5), the catch-all provision which requires, so far as is relevant here, both "circumstantial guarantees of trustworthiness" equivalent to those of hearsay statements within the specified exceptions and that the statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." We think these conditions were also satisfied, though the first more clearly than the second. Chiampas had testified before the grand jury under oath of course, and hence subject to being prosecuted if he perjured himself, but also, so far as appears, without having been pressured to testify. It is conceded that he was a disinterested witness—a mere bystander, with no axe to grind. And his testimony was corroborated at every point by the tape of the conversation, and on most points by testimony of eyewitnesses as well, including Scalise. The government stresses the corroboration but of course that undermines the second condition of admission, that the hearsay declaration be the most probative possible evidence. The government points out that at the time

Chiampas' transcript was offered in evidence there was no other direct evidence that the appellants had been present at the fight, though it could be readily inferred from the tape, and says this was an essential part of its case. It was not. The tape provided all the evidence the government needed to show extortion by the appellants.

But Rule 804 does not require that hearsay evidence be essential in order that it be admissible. It is enough that it is the most probative evidence reasonably available on a material issue in the case. It was material though not essential for the government to show that the appellants had beaten up Velentzas the night before the taped conversation; it was further evidence that the transaction discussed in the taped conversation was extortionate and not, as the appellants tried to show at the trial, a normal business transaction. And at the time that Chiampas' grand jury testimony was read into evidence the government had no other direct evidence that it was the appellants who together with Renella beat up Velentzas. It is true that later in the trial Scalise admitted his participation in the fight, but at the time Chiampas' testimony was introduced the government did not know that Scalise would so testify.

In these circumstances the introduction of the grand jury transcript complied with the requirements of Rule 804 as interpreted in *United States v. Carlson*, 547 F.2d 1346, 1354-55 (8th Cir. 1976), and even, we think, as more narrowly intrepreted in *United States v. Thevis*, 665 F.2d 616, 629 (5th Cir. 1982). And it did not violate the confrontation clause of the Sixth Amendment. Any use of hearsay testimony denies the defendant an opportunity to confront a witness against him, unless the hearsay declarant is available to be cross-examined as Chiampas was not. But this court, following the influential plurality opinion in *Dutton v. Evans*, 400 U.S. 74 (1970), has been unwilling to hold that the admission of hearsay evidence is a per se violation of the confrontation clause of the Sixth Amendment. We deem hearsay (constitutionally) admissible if the witness offering the hearsay testimony is subject to cross-examination and the circumstances under which the hearsay statement was made indicate that its content is probably true. E.g., *Davis v. Franzen*, 671 F.2d 1056, 1058 (7th Cir.

1982). The first requirement, the purpose of which is to assure that the content of the hearsay statement has been accurately reported, is inapplicable in a case such as the present one where a transcript of the statement is offered in evidence and the accuracy of the transcript is not challenged. The second requirement is applicable and satisfied; Chiampas' statement was made voluntarily and under oath and was corroborated by other, highly probative evidence. Its admission did not violate the Sixth Amendment. See *United States v. West*, 574 F.2d 1131, 1136-38 (4th Cir. 1978).

The appellants raise other procedural issues, relating to the sufficiency of the evidence and whether they should have been tried separately rather than together. These issues have no conceivable merit so we move on to the appellants' substantive contentions. The first is that the commerce requirement of the Hobbs Act was not satisfied in this case. The Act, 18 U.S.C. § 1951(a), applies to anyone who by any of the acts forbidden in the statute "in any way or degree obstructs, delays, or affects [interstate or foreign] commerce or the movement of any article or commodity in [interstate or foreign] commerce . . . ." The government argues that the payment of extortion by Velentzas to the appellants depleted or would have depleted the assets that Velentzas had for buying coffee, which was shipped to him from out of state. (It is not entirely clear whether he ever actually paid any money to the appellants, but the statute punishes the attempt along with the completed act, so it is enough if commerce would have been obstructed or affected by the payment that they demanded if it had been paid.) The appellants scoff at this proposition by pointing out that Velentzas' purchases of coffee for the Hellenic Social Club amounted to only about $68 a month, but the statutory language "in any . . . degree" suggests that it would not matter how little coffee Velentzas bought so long as it came from out of state and was affected to any extent by his having to pay extortion to the appellants.

True, the fact that such payment might by depleting Velentzas' assets have reduced his purchases of coffee does not prove that it would have had this effect. But

this court is committed to the view that commerce, within the meaning of section 1951(a), "is affected when an enterprise, which . . . customarily purchases items in interstate commerce, has its assets depleted through extortion, thereby curtailing the victim's *potential* as a purchaser of such goods." *United States v. Elders*, 569 F.2d 1020, 1025 (7th Cir. 1978) (emphasis added). We quoted this language with approval just recently in *United States v. Mattson*, 671 F.2d 1020, 1024 (7th Cir. 1982), and it covers the present case. See also *United States v. DeMet*, 486 F.2d 816, 821-22 (7th Cir. 1973). Although we declined to apply the principle to the facts of *Mattson*, that was because the case involved the extortion of money from an individual rather than a business or other enterprise. It is true that individuals have assets just as businesses do, that the depletion of an individual's assets could affect interstate commerce by causing him to buy less of some good or service which he obtains from out of state, and that the extortion of $3000 from the victim in *Mattson* may have reduced his interstate purchases by more than the payment by Velentzas of $500 a month to the appellants would have reduced his purchases of coffee for the Hellenic Social Club. In general, however, though not in every case, businesses purchase on a larger scale than individuals. Hence extortion is likely to have a greater effect on interstate commerce when directed at businesses than at individuals. That is the pragmatic justification for drawing the line between individuals and businesses or other enterprises so far as applying the depletion-of-assets theory is concerned, and we adhere to that line and reject the appellants' argument.

The last issue in the case is whether there was an extension of credit within the meaning of 18 U.S.C. § 894, of which the appellants were also convicted. The statute punishes the use of extortion to collect or attempt to collect any extension of credit or to punish any person for the nonrepayment thereof. 18 U.S.C. §§ 894(a)(1) and (2). The government's argument that the statute is applicable to this case rests on the following colloquy part of the taped conversation) between Velentzas and Boulahanis:

V: . . . How much I owe you all together?
B: You, you owe me five hundred, now, the 8th of the month. Right now I'm lettin' you go for three hundred, this past month that just passed.
V: Oh, we're starting off with five hundred, now?
B: No, next month.

The government argues that a reasonable jury could infer from this conversation that Velentzas owed the appellants $500 from last month but that the appellants were forgiving $200 of the debt and using extortion to collect the remaining $300. We are willing to accept this interpretation of the conversation but do not see how it shows an extension of credit. All it shows is that Velentzas had (in the view of the appellants, which they coerced Velentzas to accept) defaulted on a payment due the appellants. The extension of credit is a deliberate act by a creditor. It does not occur merely because a customer defaults. Section 894 does not make it a crime to use extortion to collect debts, but only to exact repayment of credit previously extended.

It is true that although the appellants and Renella evidently beat up Velentzas and smashed his furniture because he had not paid them on time, they did not collect the money due them until the next night, the night of the taped conversation. If the previous night they had given him additional time to pay, that would have been an agreement to defer payment of a debt, and such a deferral would be within the reach of section 894. See *United States v. Annerino*, 495 F.2d 1159, 1166 (7th Cir. 1974); *United States v. Horton*, Nos. 81-1155, 81-1489, 81-1178, slip op. at 10 (7th Cir. Apr. 29, 1982). But there is no evidence of such an agreement, and if perhaps it can be inferred from the circumstances still we do not think the government met its burden of proof beyond a reasonable doubt. As mentioned, the theory of the extension of credit that the government actually pressed in this case was different, and untenable.

The appellants should therefore have been acquitted on the second count; and although their sentences on count two were made to run concurrently with those on count one, it is possible that the sentences on count one

were influenced by the district judge's belief that the appellants had violated section 894 as well as section 1951. We do not mean to imply that the trial judge *must* reduce the sentence imposed. We merely remand to permit the trial judge to consider whether, under all of the information available to him including the presentence investigation report, the same or some lesser sentence should be imposed.

The appellants' convictions on count one are affirmed, their convictions on count two are reversed, and the case is remanded for entry of judgments of acquittal on count two and for resentencing on count one.

SO ORDERED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 15, 1982

Before

Hon. Jesse E. Eschbach, Circuit Judge
Hon. Philip Nichols, Jr., Associate Judge*
Hon. Richard A. Posner, Circuit Judge

United States of America,
Plaintiff-Appellee,

No. 81-1405 *vs.*

Nick Boulahanis and
Donald Scalise,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 80-CR-406
George N. Leighton, Judge.

ORDER

On June 2, 1982, Nick Boulahanis and Donald Scalise filed a petition for rehearing with suggestion for rehearing en banc. All of the judges of the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the petition. The petition is therefore DENIED.

* Of the United States Court of Claims.

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

(As amended Oct. 31, 1951, c. 655 § 17b, 65 Stat. 717.)

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a

State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the

other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

(As amended Pub.L. 94-149, § 1(12), (13), Dec. 12, 1975, 89 Stat. 806.)

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(Ratified December 15, 1791.)

Filed Jul 23 1980

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

United States of America *vs.* Frank Renella, Nick Boulahanis, and Donald Scalise	No. Violation: Title 18, United States Code, Sections 1951, 894 and 2

The SPECIAL SEPTEMBER 1978 GRAND JURY charges:

1. At all times material hereto, Eleftherios (Nick) Velentzas was the proprietor of the Hellenic Social Club, 5941 West Fullerton Avenue, Chicago, Illinois.

2. At all times material hereto, Eleftherios (Nick) Velentzas was engaged in the business of buying and selling coffee within the State of Illinois.

3. At all times material hereto, Eleftherios (Nick) Velentzas intended to purchase and did purchase coffee produced outside the State of Illinois, which coffee moved in interstate commerce from outside the State of Illinois to within the State of Illinois and was used by Eleftherios (Nick) Velentzas and the Hellenic Social Club.

4. That from in or about November, 1978, to on or about June 13, 1979, the exact dates being unknown to the grand jury, within the Northern District of Illinois, Eastern Division,

FRANK RENELLA,
NICK BOULAHANIS, and
DONALD SCALISE,

the defendants herein, did knowingly, willfully, and unlawfully obstruct, delay, and affect commerce, as that term is defined in

Title 18, United States Code, Section 1951, and the movement of articles in commerce, that is, coffee, by extortion, as that term is defined in Title 18, United States Code, Section 1951, in that the defendants did unlawfully obtain from Eleftherios (Nick) Veneltzas and the Hellenic Social Club property, that is, approximately $2,100.00 in money, which property was not due and owing the defendants but was obtained from Eleftherios (Nick) Velentzas with his consent, said consent being induced by the defendants' wrongful use of actual and threatened force and violence and fear of economic harm.

All in violation of Title 18, United States Code, 1951 and 2.

COUNT TWO

The SPECIAL SEPTEMBER 1978 GRAND JURY further charges:

1. Paragraphs one through three of Count One of this Indictment are incorporated herein by reference and thereby made a part of this Count.

2. That from on or about June 8, 1979, up to on or about June 13, 1979, in the Northern District of Illinois, Eastern Division,

FRANK RENELLA,
NICK BOULAHANIS, and
DONALD SCALISE,

the defendants herein, did unlawfully, willfully, and knowingly participate in the use of extortionate means within the meaning of Section 891(7) of Title 18, United States Code, to collect and attempt to collect from Eleftherios (Nick) Velentzas an extension of credit, that is, the defendants Frank Renella, Nick Boulahanis, and Donald Scalise, did unlawfully, willfully, and knowingly use and expressly and implicitly threaten to use violence to cause harm to the person, reputation, and property of Eleftherios (Nick) Velentzas, to collect and attempt to collect from said Eleftherios (Nick) Velentzas an extension of credit, in violation of Title 18, United States Code, Sections 894 and 2.

A TRUE BILL:

/s/ Steve J. Prokopyko
Foreman

/s/ Beverly Susler Parkhurst
Acting United States Attorney

[722] *** decide that question from all of the evidence considered by you, as you will be instructed.

With that admonition, you proceed now and have Miss Williams read this transcript.

BY MR. JOHNSON:

Q. Will you begin, ma'am.

(Grand Jury transcript read by the witness as follows:)

BY THE WITNESS: Before the Federal Grand Jury. Special September, 1978 Grand Jury, September 26, 1979, 2:00 o'clock p.m.

Jim Chiampas, having been first duly sworn by the Foreman to testify the truth, the whole truth and nothing but the whole truth, was examined and testified as follows:

Examination by Mr. Johnson:

Q. Would you please state your full name.

A. Jim Chiampas.

Q. And that is spelled C-h-i-a-m- —

A. C-h-i-a-m-p-a-s.

Q. Where do you live, Mr. Chiampas?

A. 2642 North Harlem, Elmwood Park.

Q. Mr. Chiampas, are you familiar with a place known as the Hellenic Social Club?

[723] A. Yes, I am.

Q. Have you ever been there?

A. Yes, sir.

Q. On more than one occasion?

A. Yes, sir.

Q. I want to direct your attention to June of this year and, in particular, to an evening of Tuesday night, June 12, 1979. Were you there that evening, Mr. Chiampas?

A. Yes, sir.

Q. Were there other people there like yourself?

A. Yes, sir.

Q. This is a Greek coffee shop?

A. Yes, sir.

Q. And people can eat sandwiches and drink coffee?

A. Yes, sir.

Q. Most of the people that patronize the club are Greek individuals?

A. Yes, sir.

Q. Do you recall anything unusual that you saw happen that night on June 12?

A. Yes.

Q. Would you tell us what you saw?

A. Well, I saw three men walk in and they had a fight with the owner of the coffee shop.

[724] Q. And you know that to be Nick Velentzas?

A. Yes, sir.

Q. Your testimony is that three men came in, is that correct?

A. Yes, sir.

Q. Could you tell us briefly what you saw each of the three men do?

A. Two walked up to Nick and they had a fight and one was standing by the door.

Q. I want to show you Grand Jury Exhibit No. 2 with the date of August 8, 1979.

Sir, do you recognize that photograph?

A. Yes.

Q. Is this a photograph of one of the three men you saw that evening?

A. Yes, sir.

Q. Which man was that?

A. He was standing by the door."

MR. JOHNSON: Now, Your Honor, at this time I would ask to show the Jury what was marked as Grand Jury Exhibit No. 2.

THE COURT: You may.

MR. JOHNSON: You may.

(Government's Exhibit 2 [725] published to the Jury.)

BY MR. JOHNSON:

Q. Would you continue, please, with the transcript.

BY THE WITNESS:

"BY MR. JOHNSON:

Q. I want to show you what previously has been designated as Grand Jury Exhibit No. 1 with a date of August 8, 1979. Do you recognize that photograph?

A. Yes.

Q. Who do you recognize that to be?

A. That's the one that hauled Nick.

Q. That is the one that what?

A. That's the one that hauled Nick from the back.

Q. Okay. You saw he hauled Nick from the back. Could you describe first what you saw this man do?

A. Actually, Nick kicked one of the guys and this guy grabbed him so the other guy hit him."

MR. JOHNSON: At this time in the transcript another Exhibit was shown to the witness. May I show this to the Jury at this time, Your Honor?

THE COURT: You may.

MR. JOHNSON: Exhibit No. 1.

THE COURT: You may.

MR. JOHNSON: Thank you.

[726] (Government's Exhibit 1 was published to the Jury.)

MR. JOHNSON: Thank you.

BY MR. JOHNSON:

Q. Miss Williams, will you continue with the transcripts please.

BY THE WITNESS:

A. "BY MR. JOHNSON:

"Q. Where did you see Frank grab Nick?

A. In the neck.

Q. He grabbed him with his arm around the neck?

A. Right.

Q. Your testimony is you saw the third individual hit Nick, is that correct?

A. Right.

Q. Where did he hit Nick?

A. In the stomach.

Q. What did he hit him with?

A. His hand.

Q. With his fist?

A. Right.

Q. I want to show you what has previously been marked Grand Jury Exhibit No. 3 with a date of August 8, 1979 and ask you if you recognize that photograph.

[727] A. Yes.

Q. Who do you recognize that to be, Mr. Chiampas?

A. The one that hit Nick.

Q. The one that hit him with his fist in the stomach?

A. Right.

Q. This is the third individual?

A. (Nodding affirmatively.)

Q. You have to make a response for the Court Reporter.

A. Yes, sir."

MR. JOHNSON: At this time I would like to show that Grand Jury Exhibit No. 3 to the members of the Jury.

THE COURT: You may.

MR. JOHNSON: Thank you.

(Government's Exhibit No. 3 was published to the Jury.)

MR. JOHNSON: Thank you.

BY MR. JOHNSON:

Q. Would you continue with the transcript, ma'am.

A. (Reading):

"Q. What happened after Frank and Nick Boulahanis started to beat up on Nick Velentzas?

A. Threw the one outside.

Q. Who went outside?

[728] A. Nick and those guys.

Q. So the owner, Nick Velentzas, and the three men went outside?

A. Right.

Q. Where did you go, Mr. Chiampas?

A. I was inside.

Q. Did there come a time when you went outside?

A. Yes, sir.

Q. And what did you see when you were outside?

A. When I was outside, I seen Nick and then Nick went inside, so from then I left.

Q. Okay. When you were outside, you did not go back in again?

A. No.

Q. While you were outside, did you hear any noise?

A. Yes.

Q. What did you hear, sir?

A. Noise. I don't know what, something break, but I don't know what. I can't tell what.

Q. You heard something break within Nick's coffee shop?

A. Right.

Q. But you do not know what that was?

A. No.

[729] Q. Were you afraid at all during this time, Mr. Chiampas?

A. I was kind of shook up, sure.

Q. Were other people afraid as well?

A. I think so. They're all human beings. I guess so, if they feel the way I did.

Q. The next night, June 13th, did you have occasion to also be at the social club?

A. Yes, sir.

Q. You were there during the evening again?

A. About 7:00 o'clock.

Q. The three men that you have identified, did you have occasion to see any of those three men the next night?

A. Yes, the two.

Q. I will put the three photographs out and you pick the two that you saw the next night.

A. Those two."

MR. JOHNSON: May I show those two Exhibits that Mr. Chiampas identified to the Jury?

THE COURT: You may.

MR. JOHNSON: I will simply hold them up, Your Honor, to save time.

BY MR. JOHNSON:

Q. Would you continue, please, with the transcript.

[730] A.

"Q. What did you see these two men do the next night?

A. Walk in and Nick took them outside.

Q. So you saw them walk into the club, they met with Nick, the owner?

A. Right, outside the store.

Q. And they went outside the store?

A. Right.

Q. You did not go outside the store?

A. No.

Q. So you don't know what happened outside?

A. Right.

Q. I want to show you what has previously been marked Grand Jury Exhibit No. 6 with a date of August 8, 1979. Would you look at this photograph and tell us if you can identify that individual.

A. Yes. That is the owner of the coffee shop.

Q. That is Nick Velentzas?

A. Right."

MR. JOHNSON: May I show that photograph to the Jury?

THE COURT: You may.

MR. JOHNSON: Iwill simply hold it up.

THE COURT: All right.

[731] (Government's Exhibit No. 6 was published to the Jury.)

MR. GENSON: May I see it?

BY MR. JOHNSON:

Q. Would you continue with the transcript, Miss Williams, please.

A.

"Q. Mr. Chiampas, the man that you said you saw at the door, do you remember telling the FBI that you heard him shout 'everyone stay in your seats"?

A. Yes.

Q. And he said that while he stood in the doorway?

Q. That was the first night.

Q. The first night?

A. Right.

Q. And it was the other two men that you saw beat up Nick Velentzas?

A. Right.

MR. JOHNSON: Thank you very much, sir.

THE FOREMAN: You may be excused. Thank you.

(Witness excused.)"

MR. JOHNSON: That concludes the reading of the transcript, Your Honor.

THE COURT: Any questions of Miss Williams from the [732] defense?

MR. GENSON: Just a second, Your Honor.

May we have a sidebar?

(The following sidebar conference was had, out of the hearing of the Jury.)

MR. GENSON: With reference to the reading of the transcript and with reference to the exhibition of pictures, the

defendant Scalise, joined by Mr. Boulahanis, would move for a mistrial. No argument.

THE COURT: How do I know the reason?

MR. GENSON: The reasons are the reasons I suggested in our extensive argument, for the same reasons.

THE COURT: Oh, I see.

MR. GENSON: I am just reasserting it.

THE COURT: The motion will be denied.

MR. GENSON: Thank you.

THE COURT: I see no grounds for a mistrial. All right.

(The following further proceedings were had in the hearing of the Jury.)

MR. JOHNSON: All right. Thank you, Miss Williams.

THE COURT: Thank you, Miss Williams. You are

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No. 82-263

In the Supreme Court of the United States

OCTOBER TERM, 1982

NICK BOULAHANIS AND DONALD SCALISE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the admission of the grand jury testimony of a government witness who refused because of fear for his safety to testify at petitioners' trial violated either the Confrontation Clause of the Sixth Amendment or Fed. R. Evid. 804(b)(5).

2. Whether the evidence was sufficient to prove that petitioners' extortion affected interstate commerce within the meaning of the Hobbs Act, 18 U.S.C. 1951.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 677 F. 2d 586.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1982. A timely petition for rehearing was denied (Pet. App. 10a) on June 15, 1982. The petition for a writ of certiorari was filed on August 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of affecting interstate commerce by extortion, in violation of the Hobbs Act, 18 U.S.C. 1951, and of using extortionate means to attempt to collect an extension of credit, in violation of 18 U.S.C. 894. Petitioner Boulahanis was sentenced

to concurrent terms of five years' imprisonment, and petitioner Scalise to concurrent terms of seven years' imprisonment. The court of appeals affirmed the Hobbs Act convictions, reversed the convictions under 18 U.S.C. 894, and remanded for resentencing (Pet. App. 1a-9a).

1. The evidence, as reflected in the opinion of the court of appeals, showed that Nick Velentzas owned a Greek coffee house called the Hellenic Social Club in Chicago, Illinois, where men gathered to socialize, drink coffee, and gamble (Pet. App. 1a). On June 12, 1979, petitioners and a co-defendant, Frank Renella,[1] appeared at the club, beat Velentzas with their fists, and destroyed several pieces of furniture in the club (*id.* at 1a-2a).

The next day, Velentzas contacted the FBI and was provided with a recording device that he wore strapped to his ankle (Pet. App. 2a). Petitioners returned to the coffee shop that evening. They demanded that Velentzas pay protection money in order to continue gambling in the club—$300 for the previous month and $500 per month thereafter. In return, they promised that no one else would harm Velentzas and that they would "terrorize nobody more in here" (*id.* at 2a).

Velentzas was unavailable to testify at trial, because he had been murdered by persons unknown (Pet. App. 3a). The government introduced the recording of the June 13 conversation with petitioners. In addition, the government subpoenaed James Chiampas, who was present at the coffee house when Velentzas was beaten. Chiampas appeared at trial but refused to say anything about the case because, as he explained to the court, he feared for his life. He continued to refuse to testify even though the district court

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[1]Renella became a fugitive on the eve of trial. He was apprehended in October 1981, and subsequently pleaded guilty to both counts of the instant indictment.

twice ordered him to do so (*ibid.*). The court then released Chiampas and admitted into evidence the transcript of Chiampas' grand jury testimony, in which he described the assault on Velentzas, identified petitioners and Renella from photographs as the assailants, and stated that he saw petitioners return the next night and walk outside the club with Velentzas (Pet. App. 3a, 18a-27a). Subsequently, petitioner Scalise, testifying in his own defense, admitted participating in the assault (Pet. App. 5a).

The government also proved that Velentzas' Hellenic Social Club purchased the coffee it provided to its customers from outside the State of Illinois. The total amount purchased was approximately $68 per month (Pet. App. 6a).

2. The court of appeals affirmed the convictions on the Hobbs Act count (Pet. App. 1a-9a). The court held that the admission of Chiampas' grand jury testimony was not error. It found that Chiampas was "unavailable" within the meaning of Fed. R. Evid. 804[2] and that his grand jury testimony, which had been voluntarily given under oath and was fully consistent with all other evidence, was reliable hearsay on an important part of the government's case-in-chief (Pet. App. 4a-5a). The court held that these findings satisfied the requirements of both Rule 804 and the Sixth Amendment's Confrontation Clause (Pet. App. 5a-6a).

The court of appeals also held that the evidence was sufficient to prove that petitioners' extortion had an effect on interstate commerce. The court held that any effect is sufficient and that the depletion of the club's assets, which

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[2]As the court of appeals pointed out: "[I]t would have been needless cruelty for the court to have put Chiampas to a choice between going to jail and running the risk of meeting Velentzas' fate" (Pet. App. 4a).

diminished its potential for purchasing goods in interstate commerce, satisfied the jurisdictional requirement in the Hobbs Act (Pet. App. 6a-7a).

ARGUMENT

1. Petitioners argue (Pet. 6-13) that the court of appeals erred in upholding, under the Confrontation Clause and Rule 804(b)(5), the district court's decision to admit Chiampas' grand jury testimony after he refused to testify at trial. The decision of the court of appeals, which is limited to a fact-specific evaluation of the reliability of this particular testimony, is correct and does not warrant review by this Court.

This Court has recognized previously that the hearsay rule and the Confrontation Clause have similar roots and protect essentially the same values. *Dutton* v. *Evans*, 400 U.S. 74, 86 (1970). Thus, the admissibility of prior statements of "unavailable" witnesses under both the Constitution and the Federal Rules of Evidence requires that the out-of-court statements, in light of the circumstances in which they were made, bear certain " 'indicia of reliability' " (*Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980), quoting *Mancusi* v. *Stubbs*, 408 U.S. 204, 213 (1972)) or, stated differently, contain "circumstantial guarantees of trustworthiness" (Fed. R. Evid. 804(b)(5)).

Although not all grand jury testimony satisfies the rigorous standards, see *United States* v. *Fiore*, 443 F. 2d 112, 115 (2d Cir. 1971), the issue must necessarily be disposed of on a case-by-case basis; no court of appeals has rejected all grand jury testimony as unreliable. Compare *United States* v. *Medico*, 557 F. 2d 309, 315-316 (2d Cir.), cert. denied, 434 U.S. 986 (1977); *United States* v. *Ward*, 552 F. 2d 1080, 1083 (5th Cir.), cert. denied, 434 U.S. 850 (1977), with *United States* v. *Fiore*, *supra*; *United States* v. *Gonzalez*, 559 F. 2d 1271, 1273-1274 (5th Cir. 1977). See also *United*

States v. *West*, 574 F. 2d 1131, 1134-1138 (4th Cir. 1978); *United States* v. *Garner*, 574 F. 2d 1141, 1143-1146 (4th Cir.), cert. denied, 439 U.S. 936 (1978); *United States* v. *Carlson*, 547 F. 2d 1346, 1354-1357 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977); *United States* v. *Thevis*, 665 F. 2d 616, 629-633 (5th Cir.), cert. denied, No. 81-2025 (June 1, 1982). The court of appeals' decision that the Chiampas' grand jury testimony was sufficiently reliable to warrant its admission is fully consistent with all of the cited cases.

Chiampas was a disinterested witness who had no motive to curry favor with the government by testifying before the grand jury. Moreover, his testimony was corroborated by several other sources at trial, including other witnesses, and by petitioners themselves. For example, in the tape recorded conversation of June 13, petitioner Boulahanis made reference to beating up Velentzas the previous night. In addition, petitioner Scalise testified at trial and admitted that he was present at the club on both nights, that Boulahanis and Renella struck Velentzas on the first night, and that the taped conversation was accurate (Pet. App. 5a).[3] Under these circumstances, Chiampas' grand jury testimony was in no sense "crucial" or "devastating" (*Dutton* v. *Evans*, *supra*, 400 U.S. at 87), and, indeed, as the court of appeals implied (Pet. App. 5a), the testimony became superfluous after petitioner Scalise testified. Accordingly, the use of the hearsay grand jury evidence in this case did not violate petitioners' confrontation rights as embodied in either the Constitution or Rule 804(b)(5). See *Ohio* v. *Roberts*, *supra*, 448 U.S. at 65-66; *Dutton* v. *Evans*, *supra*, 400 U.S. at 87-89.

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[3]Petitioners availed themselves of their opportunity to cross-examine the other witnesses. Petitioner Boulahanis declined, however, to cross-examine petitioner Scalise.

2. Petitioners contend (Pet. 14-16) that because Velentzas' club's purchases of coffee in interstate commerce amounted to only $68.00 a month, there was an insufficient effect on commerce to sustain their convictions under the Hobbs Act. As the court of appeals correctly pointed out (Pet. App. 6a), however, the Act punishes anyone who " 'in any way or degree * * * affects * * * commerce' " by extortion. This language demonstrates a clear intent "to use all the constitutional power Congress has to punish interference with interstate commerce by extortion * * *." *Stirone* v. *United States*, 361 U.S. 212, 215 (1960).

Accordingly, the lower courts have uniformly held that the magnitude of the effect on commerce is immaterial. See, *e.g.*, *United States* v. *Zemek*, 634 F. 2d 1159, 1173 n.20 (9th Cir. 1980), cert. denied, 450 U.S. 985 (1981); *United States* v. *Rabbitt*, 583 F. 2d 1014, 1023 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979); *United States* v. *Elders*, 569 F. 2d 1020, 1025 (7th Cir. 1978); *United States* v. *Daley*, 564 F. 2d 645, 649 (2d Cir. 1977), cert. denied, 435 U.S. 933 (1978); *United States* v. *Harding*, 563 F. 2d 299, 302 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *United States* v. *Starks*, 515 F. 2d 112, 124 (3d Cir. 1975); *United States* v. *Nadaline*, 471 F. 2d 340, 343 (5th Cir.), cert. denied, 411 U.S. 951 (1973); see also *United States* v. *Santoni*, 585 F. 2d 667, 671 (4th Cir. 1978), cert. denied, 440 U.S. 910 (1979). Petitioners admit that their extortion had some effect on interstate commerce, and that is all that is required.[4] Since the court of appeals' interpretation of the

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[4]Petitioners incorrectly rely (Pet. 14) upon an earlier Seventh Circuit decision as being in conflict with the court's decision in this case. See *United States* v. *Mattson*, 671 F. 2d 1020 (1982). That case involved the extortion of money from an individual who had no direct relationship to interstate commerce. Thus, as the court below observed (Pet. App. 7a), *Mattson* did not question the principle that a *de minimis* effect on interstate commerce is sufficient to sustain a Hobbs Act conviction. There is accordingly no conflict between the two decisions.

Hobbs Act is correct and conflicts with no decision of this Court or any court of appeals, it does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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